use of its network. So the ultimate issue, just as in the case at bar, was whether access charges were appropriate. The Western District, citing *Access Telecom*, ruled that primary jurisdiction was appropriate. The Court based its decision on two factors: (1) the area was one within the particular expertise and competence of the FCC; and (2) the FCC was in a better position to make consistent and uniform pronouncements of national telecom policy.

Courts in other jurisdictions have reached identical results, and have applied the primary jurisdiction doctrine to dismiss or stay lawsuits involving disputes over access charges. *See, e.g.* ***Total Telecommunications Services, Inc. v. Atlas Telephone Company, Inc.***, 919 F.Supp.2d 472 (D. D.C. 1996) (whether AT&T was required to pay access charges to competitive access provider and local exchange company for terminating long distance calls was properly referred to the FCC under the doctrine of primary jurisdiction); ***AMC Liquidating Trust v. Sprint Communications Company, L.P.***, 295 F.Supp. 2d 650 (M.D. La. 2003)(lawsuit stayed, so that issue of whether access charges were just and reasonable could be referred to the FCC); ***Allnet Communication Service, Inc v. National Exchange Carrier Association, Inc.***, 965 F.2d 1118 (D.C. Cir. 1992)(district court's decision to dismiss lawsuit under primary jurisdiction doctrine affirmed, where government non-for-profit corporation's access charges were challenged as invalid); ***AT&T v. United Artist Payphone Corp., slip op.***, Cause No. 90-CIV-3881 (S.D. N.Y. Decenber 3, 1990)(whether pay phone operator was a "customer" under AT&T's FCC access tariff was stayed under the doctrine of primary jurisdiction) *see also* ***In Re: Long Distance Telecommunications Litigation***, 831 F.2d 627 (6th Cir. 1987)(class action alleging that long distance carrier failed to advise customers that it

would charge them for uncompleted calls was properly referred to the FCC under the doctrine of primary jurisdiction).

C. Application of the Primary Jurisdiction Doctrine to this Case

1. The Court Would Have to Interpret Tariff Language, Determine if SBC Missouri's Construction is Reasonable, and Decide Which of Two Tariffs is Applicable

Global Crossing alleges that SBC Missouri is misinterpreting its own tariff. The FCC tariff words in dispute are:

> For... FGD...Access Services, ***where jurisdiction can be determined from the call detail,*** the Telephone Company will bill ***according to such jurisdiction*** by developing a projected interstate percentage

Global Crossing alleges that this means, "For...FGD...Access Services, ***where the actual physical geographic location of the calling party at the time he initiates the call*** cannot be determined from the call detail ***because it is a cellular call and therefore the calling party's geographic location could be anywhere,*** the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage...." Under this interpretation, all cellular calls would be governed by the EES Method and the PIU. SBC Missouri, in contrast, argues that the tariff means, "For...FGD...Access Services, where jurisdiction can be determined ***because the calling party's number is available in the call detail,*** the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage...." Under SBC Missouri's interpretation--the same interpretation it has used for over 12 years with numerous other IXCs-- only "unknown" cellular calls (i.e. those whose originating telephone number is not revealed by the call detail) are treated by the EES Method and the PIU. Which party is correct? The only way to resolve this is to interpret the language of the federal tariff,

to determine if SBC Missouri's interpretation is reasonable, and to decide which tariff (federal or state) applies to the particular call. Courts are ill-equipped to make this determination. *See U.S. v. Western P. R.Co., supra*, 352 U.S. at 65 (Court refused to determine which of two I.C.C. freight tariffs applied, because resolution required intimate knowledge of complex and technical cost allocation formulae used to determine freight costs of hazardous cargo; "The effect of the holding is clear: the courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well"); *Access Telecom, supra,* 137 F.3d at 609 (Court refused to make determination as to whether SWBT correctly followed its own telecommunications tariff in providing VG 7 tariff and setting 6,000-foot limitation for service)..

2. The Court Will Have to Sift Through Telecommunications Jargon and Terms of Art

Resolution of this issue will necessarily require an intimate understanding of technical regulatory terms of art in the telecommunications industry. "[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that the inquiry is essentially one of fact and of discretion in technical matters, then the issue of tariff application must first go to the Commission." *U.S. v. Western Pacific, supra,* 352 at 66 (Court would not interpret technical terms in freight tariff relating to what constituted an "incendiary bomb" for freight purposes); *Acccess Telecom, supra,* 137 F.3d at 609 (Court would not interpret matters relating to circuit designs, signal transmissions, noise attenuation, echo return loss, phase jitter, and other technical terms). The technical terms involved in this case include, but are not limited to:

> Entry-Exit Surrogate, PIU factors, IJP factors, IXC, FGD Access Service, FGA Access Service, FGB Access Service, end office, CPN, projected interstate percentage, terminating access charges, originating access charges, terminating access minutes, MOUs, ANI capability, call detail, LATA, CMRS provider, OCC, roaming traffic, known traffic, unknown traffic, transport rates, LECs, ILECs, MTA, and allocational factors.

These are not matters within the conventional experience of judges, and it makes more sense to allow the agency charged with specialized knowledge of those terms to act first.

3. The FCC Has the Expertise

The FCC has ruled on a number of similar issues. The FCC has the expertise to make the determination in this case.

a. The 1985 MCI Case

In ***In the Matter of MCI Telecommunications Corp, supra,*** FCC 85-145 (April 16, 1985), the dispute revolved around how to calculate "unknown" traffic. The particular service at issue in that case was Feature Group A and Feature Group B access service.2 *Id.* at Para. 5. One particular feature of those two services was that ANI was unable to register the originating telephone number in the call detail. *Id* at para. 5; ***In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, supra,*** 4 FCC Rcd. 8448, FCC 89-316 (Dec. 5, 1989), para. 3 ("However, for other access arrangements, such as FGA and FGB services, ***that generally do not provide ANI capability,*** the LECs typically lack the technical ability to identify and measure jurisdictional usage"). MCI had three principal objections: first, MCI objected to local telephone companies conducting audits to determine if MCI's PUI was really accurate; second, MCI objected to the EES method for determining

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2 In the early days after divestiture, customers of inter-exchange carriers other than AT&T had to dial a seven digit number, receive a second dial tone, and then complete the call. SBC Missouri charged those carriers other than AT&T access charges for terminating traffic. The particular service used by those carriers was Feature Group A and B.

"unknown" traffic; and third, MCI argued that the existing methodology used to determine the jurisdiction of some calls in areas which bordered two states resulted in over-billing for intrastate calls which should be more accurately classified as interstate. On this last claim, MCI argued that MCI should be able to use an adjustment factor to compensate itself for these over-billings, and wanted FCC approval of such an adjustment. The FCC rejected all three claims. First, the FCC allowed the billing audits. Second, it officially adopted the EES Method as the interim method for determining the jurisdiction of unknown traffic. Third, the FCC refused to approve MCI's adjustments and was skeptical that MCI could really prove it was over-billed. The FCC explained:

> The amount of traffic appears to be relatively small....In addition, some of the false intrastate traffic at issue here is undoubtedly offset by false interstate traffic....While we recognize that some traffic that appears to be intrastate from the [IXC's] perspective is actually interstate in extent, and vice versa, no consideration has been put forward here that causes us to suppose that there is any significant excess of such false intrastate traffic (or "invisible traffic", as it might also be described) over its counterpart, false interstate traffic.... It is for MCI, though, as the proponent, to substantiate the premises on which its argument depends, the chief of which is that there is a net, nationwide excess of false intrastate over false interstate traffic.
> *Id.* at paras. 20-21.

Therefore, while the MCI case dealt with the measurement of "unknown" traffic and the case here deals with "known" traffic, it is nevertheless relevant. First, it shows that the FCC is the expert on the jurisdiction of different types of calls, the classification of calls as interstate or intrastate and the treatment of "known" versus "unknown" traffic. Second, it shows that the FCC will enforce tariffs which may inaccurately characterize the actual physical geographic location of the calling party. In this case, the FCC was not bothered by the fact that there may have been some allegedly "false" intrastate traffic which was offset by some allegedly "false" interstate traffic.

b. The 1989 Feature Group A/B Case

In another Order in 1989, ***In the Matter of Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service***, 4 FCC Rcd. 8448, FCC 89-316 (Dec. 5, 1989), *supra*, the FCC revisited this issue. Because the 1985 Order approving the EES Methodology of measuring unknown traffic was only made on an "interim" basis, the FCC established a Joint Board (comprised of state and federal regulators) to examine the issue and propose a permanent resolution to the problem. The Board recommended, and the FCC adopted, the unadjusted EES method as the permanent solution, and adopted other recommendations as well. In its Order, the FCC again made clear that the ANI was to be used to jurisdictionalize unknown traffic:

> 3. Subject to limited exceptions, LECs(lower case???) [like SBC Missouri] provide interstate switched access services pursuant to interstate tariffs filed with the Commission and provide their corresponding intrastate services through tariffs at the state level. With many access services, particularly ***those that provide automatic number identification capability [FN 9], jurisdictional usage is readily segregable for this purpose.*** However, for other access arrangements, such as FGA and FGB services, that generally do not provide ANI capability, the LECs typically lack the technical ability to identify and measure jurisdictional usage. FN 19. ANI capability enables the carrier to identify the ***originating number*** of a call which, when combined with the ***called number, reveals the jurisdictional nature of the call.***
> ***FCC 89-316 Order at para. 3.***

It is only in the case of "unknown" traffic, where call detail is not available, that the parties resort to other measures to determine the jurisdiction of calls.

c. The 1992 SS7 Order

The language currently found in the FCC Access Tariff No. 73 relating to the jurisdiction of calls was first introduced by SBC Missouri in 1991 [second paragraph of tariff] and 1992 [first paragraph of tariff]. The jurisdictional changes were included as part of a tariff offering for a switching feature called "Signaling System Seven" ("SS7").

In April 1992, MCI and Sprint filed petitions to reject, or to suspend and investigate, the tariff, arguing, among other things, that the jurisdictional changes were unfair. In ***In the Matter of Southwestern Bell Telephone Company Revisions to Tariff F.C.C. Nos. 68 and 73, Transmittal 2182***, 7 FCC Rcd. 3456 (FCC May 15, 1992), the FCC rejected the challenges of MCI and Sprint. The FCC explained SBC Missouri's rationale for the new changes:

> However, SWB argues that with the introduction of SS7, the CPN [i.e. "calling party's number"] becomes available as an additional parameter in the signaling message. ***SWB asserts that when the CPN is passed on a call terminating to SWB, the jurisdiction of the call can be determined from the actual call detail of the usage record (i.e. originating number and terminating number are present on the record), and thus there is no reason to apply any other PIU factor....***" *Id.* at para. 7 (emphasis added).

The FCC concluded that "...no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time." *Id.* at para. 8.

In this Order, the FCC concluded that there were no grounds to invalidate it. And while the Order does not directly address the issue of cellular calls, the FCC must have considered the issue, because cellular use was widespread by 1992.

d. <u>The First Report and Order</u>

The FCC also recognized the difficulty in measuring, tracking, and billing cellular calls in ***In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local exchange carriers and Commercial radio Service Providers*** [hereafter "First Report and Order"], 11 FCC Rcd. 15499, FCC 96-325 (Aug. 8, 1996), para. 1044. That proceeding is not directly on point because it concerns the way in which cellular phone companies (like T-Mobile) and

local companies interconnect, share traffic, and pay each other reciprocal compensation under interconnection agreements. It has nothing to do with the amounts IXCs (like Global Crossing) should pay for access services under tariffs. But it does state that commercial mobile radio service ["CMRS"] "...customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge." *Id.* In order to remedy this situation, the FCC held that the parties could come up with their own arrangements, including traffic studies. Again, this case shows that the FCC is the expert on cellular calling and the jurisdictionalizing of calls.

4. Uniform National Telecommunications Policy

It is SBC Missouri's understanding that Global Crossing has filed similar lawsuits across the country asking multiple courts to resolve this tariff issue. If the Court makes this decision, its decision could conflict with interpretations by other courts across the country, resulting in a patchwork of interpretations in classifying traffic. There should be one standard across the country as to how to classify cellular calls as interstate or intrastate. The best answer is to allow the government agency charged with setting national policy to make this call. The primary jurisdiction doctrine is often used to achieve a uniformity and consistency within a field of regulation. ***Access, supra***, 137 F.3d at 608; ***Nader v. Allegheny Airlines, Inc.***, 426 U.S. 290, 303-304, 96 S.Ct. 1978, 1986-87, 48 L.Ed.2d 643 (1976).

Accordingly, for all of these reasons, this Court should dismiss the Plaintiff's lawsuit without prejudice based on the primary jurisdiction doctrine.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading was e-mailed and mailed, postage pre-paid, to the following individuals at their business addresses on this 28th day of April, 2004.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

GLOBAL CROSSING TELECOMMUNICATIONS, INC., a Michigan corporation, Plaintiff, v. SOUTHWESTERN BELL TELEPHONE, L.P. a Texas limited partnership, Defendant.	Case No. 4:04-CV-00319-ERW

PLAINTIFF'S COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STAY BASED UPON THE DOCTRINE OF PRIMARY JURISDICTION

Plaintiff Global Crossing Telecommunications, Inc. ("Global Crossing"), by its undersigned attorneys, respectfully submits this opposition to the motions of Defendant Southwestern Bell Telephone, L.P. ("Defendant" or "SBT") to dismiss, or in the alternative, stay Plaintiff's Complaint on the basis of the primary jurisdiction doctrine. Resolution of Plaintiff's claims requires this Court merely to determine the meaning of words used in their ordinary sense in Defendant's federal tariff and apply that meaning to undisputed facts. Neither the validity nor the reasonableness of the tariff is at issue. Such an inquiry does not implicate the primary jurisdiction doctrine. Defendant's motions, accordingly, should be denied. If this Court is nonetheless inclined to refer any issue in this matter for resolution by the Federal

Communications Commission ("FCC"), as Defendant requests, the Court should stay the case rather than dismiss it.

INTRODUCTION

Global Crossing alleges that SBT violated and continues to violate the Federal Communications Act of 1934 ("FCA"), as amended, 47 U.S.C. §§ 151 *et seq.*, and the terms of SBT's federal tariff, by charging Global Crossing *intra*state rates for *inter*state wireless telephone communications services. As Global Crossing alleged in its Complaint, SBT improperly imposed the higher intrastate rate on interstate cellular calls – calls made from one state to another – by relying upon the phone number assigned to the mobile phone from which the call is placed, rather than the caller's physical location, to determine whether the call is billed at the intrastate or interstate rate.

In the FCA, Congress granted plaintiffs, such as Global Crossing, claiming to be damaged by a common carrier, such as SBT, the unequivocal right to either file a complaint with the FCC or bring a lawsuit for the recovery of damages against the common carrier in the United States district courts. *See* 47 U.S.C. § 207. Notwithstanding the clear and unequivocal language of the FCA, SBT's motions attempt to deprive Global Crossing of its statutory right under the FCA to select the forum to resolve this dispute.

In its motion, SBT argues that, even though this matter has properly been filed in the district courts, this Court should dismiss this action based upon the doctrine of "primary jurisdiction," and require Global Crossing to file a complaint with the FCC. To support its claim that the FCC has "primary jurisdiction" over this lawsuit, SBT argues that resolution of this dispute will require interpretation of telecommunications tariffs and terms of art, immersion into

the technical details surrounding mobile phone traffic, and pronouncements of national telecommunications policy. SBT's arguments are specious, at best.

Contrary to SBT's arguments, Global Crossing's claims are simple and straightforward, the resolution of which requires this Court merely to determine the meaning of words used in their ordinary sense in SBT's federal tariff and apply that meaning to facts that are largely undisputed. Indeed, the analytical framework applicable to this dispute is no different than that required for any contractual dispute.

As described in the Complaint and conceded in SBT's motion papers, SBT's tariff contains two methods for identifying the jurisdictional character of telephone calls. Where the originating and terminating locations of a call are known, traditionally in reliance on the telephone numbers, the call is characterized on the basis of those geographic points. On the other hand, where the originating point of the call is "unknown," either because there is no originating number contained in the "call detail" or because the number shown does not indicate a location, a different methodology is applied to determine jurisdiction. Accordingly, the narrow dispute here is over which of these two methods properly applies to mobile phone calls. It is Global Crossing's position that SBT improperly treats mobile phone calls by determining whether they are interstate or intrastate by reference to the caller's mobile phone number, despite admitting that the number does not indicate the geographic location of the caller.

For many calls, the calling phone number is provided to SBT as part of the "call detail." *See* Def.'s Mem. of Law in Supp. of its Mot. to Dismiss Based Upon the Doctrine of Primary Jurisdiction ("Def.'s Mem.") at 4-5. SBT readily acknowledges, however, that in the case of mobile phone calls the calling number does not indicate the geographic location of the customer placing the call. *Id.* at 5; *see also id.* at 6 ("Proving exact origination points of cellular calls with

the ANI [originating portion of call detail] is not currently possible."). Despite this admission that the originating number of a mobile phone call does not indicate the geographic location of the caller, SBT nonetheless assumes that the geographic location of a mobile phone caller *is* known for purposes of determining whether to apply intrastate or interstate rates. SBT does this by ignoring its own tariff and incorrectly categorizing mobile phone calls as calls where the originating location is "known," rather than as calls where the origination location is "unknown."

This dispute, as SBT acknowledges, is a narrow one involving one phrase from SBT's federal tariff: whether "jurisdiction [*i.e.*, intrastate or interstate] can be determined from the call detail," even though the call detail admittedly does not reveal the geographic location of the person placing the call. *See id.* at 16. Neither the validity nor the reasonableness of the tariff is at issue. This Court is asked only to interpret the phrase "where jurisdiction can be determined from the call detail" – a phrase that has not been given some specialized, technical meaning, but is used in its ordinary sense. Interpretation is made even simpler by SBT's candid admission that the answer to the question is "no" – the proper jurisdiction of a mobile call cannot be determined on the basis of the call detail. Nonetheless, in an attempt to deprive Global Crossing of its choice of forum or otherwise delay resolution of Global Crossing's claims, SBT requests this Court to dismiss the case pursuant to the primary jurisdiction doctrine, a judicially-created doctrine permitting courts to refer issues of fact not within the conventional experience of judges or cases involving the exercise of administrative discretion to administrative agencies for initial resolution.

SBT's motion is based primarily upon the flawed premise that all questions of tariff interpretation must be referred to the FCC, because courts are allegedly ill-equipped to interpret regulatory tariffs. *See id.* at 16-17. SBT's over-expansive view of the scope of the primary

jurisdiction doctrine is contrary to case law and SBT's public filings in other matters. The primary jurisdiction doctrine does not forbid all judicial interpretation of regulatory tariffs as Defendant suggests. In cases such as this, where the question is whether the terms of a tariff have been violated, rather than whether the tariff itself is valid or reasonable, the primary jurisdiction doctrine is inapplicable.

BACKGROUND

Once approved by the FCC, the terms of the SBT tariff became "the law" setting forth SBT's and its customers' rights and responsibilities. *See, e.g., Access Telecomms., v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 607 (8th Cir. 1998); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840-41 (9th Cir. 2000). *See also Ambassador, Inc. v. United States*, 325 U.S. 317, 325 (1945); *MCI Telecomms. Corp. v. Ameri-Tel, Inc.*, 852 F. Supp. 659, 668 (N.D. Ill. 1994). SBT's federal tariff provides that SBT will bill for calls by one method "where jurisdiction can be determined from the call detail" and by another method "where call details are insufficient to determine jurisdiction." The question posed by this case is only whether "jurisdiction can be determined from the call detail." The methods used to bill for calls once that question is properly answered are not disputed.

Global Crossing does not dispute, as SBT argues at length, Def.'s Mem. at 10-11, that the FCC has the authority to interpret SBT's federal tariff. The FCA also, however, specifically grants this Court authority to do so in adjudicating Global Crossing's Complaint. Plaintiffs under the FCA may elect to resolve their complaints administratively, through a filing with the FCC, or judicially, by filing a complaint in district court. Global Crossing elected to pursue its claims against SBT in this Court, as specifically permitted by the FCA. Section 207 of the FCA provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the [Federal Communications] Commission as hereinafter provided for, or *may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction*; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207 (2001) (emphasis added). Consistent with this provision, Global Crossing filed suit in this Court against SBT, and demanded a jury trial.[1]

SBT seeks dismissal of Global Crossing's case and referral to the FCC on the purported basis that resolution of Global Crossing's claims will require this Court to consider many technical terms, despite the fact that only one of them ("call detail") appears in the disputed portion of the tariff. *See* Def.'s Mem. at 17-18. SBT does not explain why consideration of these terms would be required for this Court to interpret the single phrase in dispute, which involves only the interpretation of the phrase "where jurisdiction can be determined from the call detail." SBT similarly attaches to its memorandum five of SBT's state tariffs, despite the fact that none of those tariffs is implicated in this case.

ARGUMENT

I. The Primary Jurisdiction Doctrine Is a Limited, Judicially-Created Doctrine and Does Not Preclude Judicial Interpretation of Regulatory Tariffs.

The primary jurisdiction doctrine's genesis lies in the 1907 *Abilene* decision, in which the United States Supreme Court held that attacks on the *reasonableness* of rates charged by

[1] The FCA further provides that if Global Crossing prevails in its suit it will also be entitled to recover attorney's fees, and that such fees are to be fixed *by the court*. 47 U.S.C. § 206 ("[Common carriers] are liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, *to be fixed by the court* in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.") (emphasis added).

railroads under established tariffs – as distinguished from claims based on the *violation of* established tariffs – should be referred to the Interstate Commerce Commission ("ICC"). *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41, 48 (1907) (holding that shipper seeking reparation predicated upon the alleged unreasonableness of an established rate must seek redress through the ICC). The doctrine was conceived as a means of accommodating the sometimes conflicting goals of the same sovereign – such as conflicting regulatory and antitrust policies. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 302 (1973); *Litton Sys., Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 420-21 (5th Cir. 1976). To that end, the doctrine seeks to reserve to administrative agencies those questions that are peculiarly within their domain. *Dahl v. Hem Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993).

Accordingly, in cases raising issues of *fact* not within the conventional experience of judges or cases requiring the exercise of administrative discretion, the primary jurisdiction doctrine encourages issues to be referred to the agencies created by Congress for regulating the subject matter for initial resolution. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Invocation of the doctrine is appropriate only where there is a factual question requiring expert consideration by an administrative body and uniformity of resolution. *E.g., Continental Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 574 (E.D. Va. 2000). Questions of law that do not require the specialized development of related facts are within a court's expertise and should not be referred to an agency. *E.g., Gilmore v. Southwestern Bell Mobile Sys., L.L.C.*, 210 F.R.D. 212, 221 (N.D. Ill. 2001).

Courts, moreover, are reluctant to invoke the primary jurisdiction doctrine, because added expense and undue delay may result. *E.g., Access Telecomms.*, 137 F.3d at 608; *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (*citing United States v.*

McDonnell Douglas Corp., 751 F.2d 220, 224 (8th Cir. 1984)). Even in cases where referral to an administrative agency would be appropriate – unlike here – courts ordinarily balance the advantages of applying the doctrine against the expense and delay inherent in such referral and the need to resolve disputes fairly yet as expeditiously as possible. *E.g., Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 n.15 (5th Cir. 1981); *Advamtel, LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476, 480 (E.D. Va. 2000); *MCI Telecomms. Corp. v. Gorman, Wells, Wilder & Assocs., Inc.*, 761 F. Supp. 124, 126 (S.D. Fla. 1991).[2]

A. Courts Frequently Interpret Tariffs.

Against this legal background, SBT suggests that the primary jurisdiction doctrine absolutely precludes all courts from interpreting and enforcing regulatory tariffs, essentially writing the choice of forum provision in section 207 out of the FCA. Courts have uniformly rejected SBT's position.

The United States Supreme Court, for example, explicitly rejected SBT's overly-restrictive position long ago, in *Western Pacific*, which SBT recognizes as the seminal Supreme Court case describing the contours of the preliminary jurisdiction doctrine. *United States v. W. Pac. R.R.*, 352 U.S. 59 (1956); Def.'s Mem. at 11. *Western Pacific* involved questions regarding the proper rate applicable to commodities shipped under an applicable tariff, and, in particular, whether napalm gel in steel casing but without a "burster" or fuse should be deemed an "incendiary bomb," requiring payment of a higher rate than would be required if the shipment

[2] Delays inherent in such referrals, particularly to the FCC, can be substantial. *See Advamtel, LLC*, 105 F. Supp. 2d at 481-82. Although the FCA provides that complaints before the FCC are to be resolved within five months, *see* 47 U.S.C. § 208(b)(1), there is little recourse to complainants in cases where resolution takes longer, short of filing another suit naming the agency as the defendant, further delaying resolution. Even thirteen years ago, "[t]he usual time table for investigation under section 208 [was] twelve to fifteen months depending on the complexity of the case." *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1436 (3d Cir. 1991).

were characterized simply as fuel. 352 U.S. at 60-61. The Supreme Court, noting that the reasonableness of the tariff itself had also been called into question by the parties, held that referral to the ICC was appropriate under the primary jurisdiction doctrine. *Id.* at 61, 66-70. At the same time, the Supreme Court made clear that regulatory tariffs *are* subject to plain language interpretation in the courts, but that where questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues agency referral is appropriate. *Id.* at 69.[3] Indeed, as the Supreme Court had previously explained, the *interpretation of a tariff is ordinarily a question of law*, which does not differ in character from questions presented when the construction of any other document is in dispute, and well within the competence of the judiciary. *Great N. Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922).

Other courts, echoing the Supreme Court's language, have similarly made clear that the primary jurisdiction doctrine is wholly inapplicable where language in a tariff is plain and does not require the interpretation of previously undefined technical terms (like "incendiary bomb") or consideration of complex matters reserved to agency expertise. *E.g., Shell Oil Co. v. Nelson Oil Co.*, 627 F.2d 228, 232 (Temp. Emer. Ct. App. 1980) (doctrine does not apply where the only task facing the trial court is to determine the meaning of words which were used in their ordinary sense and to apply that meaning to undisputed facts); *Chesapeake & Ohio Ry. Co. v. Int'l Harvester Co.*, 272 F.2d 139, 141-42 (7th Cir. 1959) (mere speculative assertion that tariff language is not used in ordinary sense is insufficient to justify referral to agency in absence of any allegations which would afford a basis for attributing any specialized, technical or peculiar meaning to the provision at issue); *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095,

[3] *See also United States v. Interstate Commerce Comm'n*, 309 F. 2d 645, 646 (D.C. Cir. 1962) (noting that, in *Western Pacific*, "[t]he Court did not say that cost-allocation is relevant to the construction of a term which by settled usage has a plain and unambiguous meaning.").

1099 (W.D. Mo. 2001) (noting that if case involved no more than action to enforce a tariff, there would be no need for referral to the FCC)[4]; *Alaska Cargo Transp. Inc. v. Alaska R.R.*, 834 F. Supp. 1216, 1229 (D. Alaska 1991) (primary jurisdiction doctrine not applicable where validity of tariff itself not attacked, and interpretation of tariff language did not involve consideration of cost allocation or interpretation of previously undefined technical terms); *Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n*, 683 F. Supp. 1375, 1376-77 (N.D. Ga. 1987) (where tariff is unambiguous, no issues of cost allocation are raised, and reasonableness of tariff *per se* is not attacked, tariff language may be interpreted and applied without aid of agency expertise); *Union Pac. R.R. v. Structural Steel & Forge Co.*, 344 P.2d 157, 158-60 (Utah 1959) (where reasonableness of tariff *per se* is not at issue, and an examination of the words at issue reveals no special or technical meaning, construction of the tariff is a question of law that should be answered by the courts).

Further, terms do not become "technical" merely because they are used in a regulatory context. *See, e.g., APCC Servs., Inc. v. Worldcom, Inc.*, 305 F. Supp. 2d 1, 17, 20 (D.D.C. 2001) (finding that court could interpret meaning of "identifying itself" and "answered by the called party" as used by the FCC in absence of suggestion that the words are used in a technical sense). The primary jurisdiction doctrine does *not* require that all claims within an agency's purview be decided by that agency, nor is the doctrine intended to "secure expert advice" for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's gambit. *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). *See also United States v. General Dynamics Corp.*, 828 F.2d 1356, 1363 (9th Cir. 1987) ("While it is

[4] SBT relies upon *Sprint Spectrum*, *see* Def.'s Mem. at 14-15, but neglects to mention that unlike here, there was no tariff to enforce in that matter; in the words of the court, "[t]here is no tariff that has been filed which serves as the basis for Sprint's [claims]." *Sprint Spectrum L.P.*, 167 F. Supp. 2d at 1099.

certainly true that the competence of an agency to pass on an issue is a necessary condition to the application of the [primary jurisdiction] doctrine, competence alone is not sufficient.").

B. Tellingly, SBT's Current Position Contradicts Its Own Argument Previously Advanced Before this Court.

In addition to being inconsistent with governing case law, SBT's argument is contrary to the position taken by SBT in prior litigation before this Court, when SBT filed suit against Allnet for its alleged failure to pay for access services (the very same services at issue here) provided by SBT. Ironically, SBT lost its argument in that case, as this Court granted a motion by the defendant Allnet for referral to the FCC pursuant to the primary jurisdiction doctrine. *See Southwestern Bell Tel. Co. v. Allnet Communications Servs.*, 789 F. Supp. 302 (E.D. Mo. 1992). The circumstances there were quite different than here, however. This Court found that referral was appropriate in *Allnet* largely because SBT filed its suit in this Court *after* Allnet had already initiated a complaint before the FCC challenging the reasonableness of SBT's charges, thereby depriving *Allnet* of its choice of forum and raising the specter of possibly inconsistent rulings in the Court and before the FCC. *See id.* at 304-306.

In complete contradiction of the position that SBT is currently espousing in this case, SBT argued in *Allnet* that the FCA gives plaintiffs a choice of forums: the FCC or federal district court. *Id.* at 303. *See also* Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Stay (Mar. 4, 1992) (attached hereto as Exhibit A) at 2 (criticizing Allnet's "novel proposition that the FCC has *exclusive* jurisdiction over this action" and noting that "[b]y the plain language of the Act, Congress has given plaintiff the unequivocal right to pursue its claim for damages in this Court."). SBT also correctly argued in *Allnet* that courts are more than capable of deciding "purely 'legal questions'" where the reasonableness of a tariff is not at issue and that the primary jurisdiction doctrine is inapplicable to such questions. *Id.* at 5-6. In this matter, SBT has

reversed its position. SBT is wrong again, however; the position it espoused in *Allnet* is the correct one for the facts presented here.

C. The "Reasonableness" of SBT's Tariff Is Not at Issue Here.

Recognizing the fundamental weakness of its position, SBT attempts to cast the dispute as one involving reasonableness – whether SBT's "interpretation [of its federal tariff] is reasonable." Def.'s Mem. at 17. Whether SBT's *interpretation* of its tariff is reasonable is not the same question as whether SBT's tariff *itself* is reasonable, and only the latter is properly referable to the FCC. There is a fundamental difference between a claim that a tariff is unreasonable and therefore unlawful, and a claim, like that presented here, that a tariff has been violated. *E.g., Ambassador, Inc.*, 325 U.S. at 324 (holding that determination as to whether terms of tariff were violated is properly made by trial court in first instance, but that reasonableness of tariff should be referred to agency); *Advamtel, LLC*, 105 F. Supp. 2d at 480-82 (determining that Sprint violated terms of tariff by refusing to pay rates fixed by tariff, characterizing such determination as well within the ordinary competence of the courts and noting that "the doctrine of primary jurisdiction does *not* apply to an action seeking the enforcement of an established tariff," but holding that the reasonableness of the tariff must be referred to the FCC). The courts, moreover, rightly reject attempts by litigants to recast questions of construction of the terms of a tariff as questions of the reasonableness of that tariff, as SBT has attempted to do in this case. *See MCI Telecomms. Corp.*, 852 F. Supp. at 664-668.

This case presents only a question of law, involving no more than the application of undisputed facts to the provisions of SBT's federal tariff. For purposes of establishing liability in this case, there are no facts in dispute as evidenced by SBT's own motion. This case does not involve any question of the reasonableness of SBT's tariff, and the myriad cases involving such

questions relied upon by SBT in support of its motion for referral are therefore of no import.[5] *See, e.g., AMC Liquidating Trust*, 295 F. Supp. 2d 650 (M.D. La. 2003); *Southwestern Bell Tel. Co.*, 789 F. Supp. 302 (E.D. Mo. 1992); *In Re Long Distance Telecomms. Litig.*, 831 F. 2d 627 (6th Cir. 1987).

SBT has never alleged that any of the words in the relevant provision of SBT's federal tariff are not used in their ordinary sense. SBT's purported justification for referral, a laundry list of terms that may be found in various SBT tariffs but are not in dispute here – consistent with SBT's mistaken belief that the primary jurisdiction doctrine precludes all plain language interpretation of regulatory tariffs – amounts to little more than "a general assertion that this [is] a tariff matter and therefore should be heard by the FCC." This reasoning is incorrect and should be rejected by this Court. *See Nat'l Communications Ass'n v. AT&T Co.*, 46 F.3d 220, 223 (2d Cir. 1995) (rejecting referral request by AT&T, who "vaguely refer[red] to issues that are 'delicate' and 'complex' and that present 'a strong likelihood of inconsistency of interpretation and enforcement.'").

II. The Meaning of "Where Jurisdiction Can be Determined from the Call Detail" in the Context of SBT's Federal Tariff Is a Legal Question That Does Not Require Referral to the FCC.

Courts consider the following factors in deciding whether to refer an issue for preliminary resolution by an administrative agency pursuant to the primary jurisdiction doctrine: (1) whether the question at issue is within the conventional experience of the judge; (2) whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of the

[5] SBT also cites cases in which a complaint had been filed before the FCC *prior* to the filing of a suit in district court; those cases are similarly inapposite. *See Total Telecomms. Servs., Inc. v. AT&T*, 919 F. Supp. 474, 478-80 (D.D.C. 1996); *Southwestern Bell Tel. Co.*, 789 F. Supp. at 305; *AT&T v. United Artist Payphone Corp.*, No. 90 Civ. 3881, 1990 WL 200653, at *5-*6 (S.D.N.Y. Dec. 3, 1990).

agency's expertise; (3) whether there exists a danger of inconsistent rulings disruptive of a statutory scheme; and (4) whether a prior application to the agency has been made. *E.g., Southwestern Bell Tel. Co.*, 789 F. Supp. at 304.[6] Consideration of those factors in this case demonstrates that referral would be inappropriate.

A. The Issue Presented In this Case Is Within Conventional Judicial Experience.

The first two factors do not support referral here, because the meaning of "where jurisdiction can be determined from call detail" is well within the conventional experience of the courts and is apparent without the exercise of agency expertise. The need to separate calls jurisdictionally into interstate and intrastate categories does not arise from some esoteric, technical requirement imposed by the FCC. Rather, the need to separate calls is based upon strictly legal concerns regarding the division of federal and state authority in the United States Constitution. As the Supreme Court noted, when it first imposed the jurisdictional separations requirement upon telephone companies, such separations are "essential to the appropriate recognition of the competent government authority in each field of regulation." *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930). This Court is perfectly capable of interpreting whether "jurisdiction can be determined from the call detail" as set forth in SBT's federal tariff, and whether a call placed from a location inside a state to another location within that same state may properly be characterized as interstate, as SBT admits it has done.

Common sense, as well as the FCA itself, dictates that an interstate call is one that is from a caller in one state to someone in another. The FCA defines "interstate communication as follows: "*communication from any State*, Territory, or possession of the United States (other than

[6] The courts must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings. *E.g., N.Y. State Elec. & Gas Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 168 F. Supp. 2d 23, 26 (N.D.N.Y. 2001).

the Canal Zone) or the District of Columbia, *to any other State*, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia ... *but shall not ... include wire or radio communication between points in the same State*, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. §153(22) (emphases added). *See also, e.g., In re GTE Tel. Operating Cos.*, 13 FCC Rcd. 22,466, at ¶16 (Oct. 30, 1998) (noting that under the FCA "[t]raffic is deemed interstate 'when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia, and terminates in another state, territory, possession, or the District of Columbia").

As Global Crossing noted in its Complaint, *see* Complaint ¶12, the FCC uses the actual end points of a communication to determine jurisdiction. *See, e.g., In re GTE Tel. Operating Cos.*, 13 FCC Rcd. 22,466, at ¶17 ("[T]he Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."); *In re Teleconnect Company*, 10 FCC Rcd. 1626, 1629-30 (Feb. 14, 1995) (noting that jurisdiction is based upon end-to-end nature of the communications and that the FCC regulates communications interstate in nature when examined from inception to completion and noting that there is no basis for distinguishing between a call's jurisdictional nature and its status as intrastate or interstate for billing purposes), *aff'd sub nom., Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); *In re N.Y. Tel. Co.*, 76 F.C.C.2d 349, at ¶9 (Mar. 12, 1980) (*citing United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom., Hotel Astor, Inc. v. United States*, 325 U.S. 837 (1945)) ("That the [Federal] Communications Act contemplates the regulation of interstate wire communication from its